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Punjab National Bank v Malayan Banking Bhd

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(IM)(NCC)-1891–09 OF 2018
HAMID SULTAN, HANIPAH FARIKULLAH AND KAMALUDIN MD SAID JJCA
18 JUNE 2020

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Banking — Letter of credit — Bill of lading — Letter of credit ('LC') issued by bank in India contained condition precedent that only ocean bill of lading ('BL') for shipment of goods was acceptable and not a freight forwarder's BL ('FBL') — Despite condition, negotiating bank in Malaysia released payment to beneficiary on strength of FBL and other faxed copies of documents — Whether issuer of LC entitled to refuse to reimburse negotiating bank on account of fundamental breach of term of LC — Whether negotiating bank's reliance upon faxed copies of documents to release payment also breached terms of LC

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The appellant ('PNB') had issued a letter of credit ('LC') in favour of a Malaysian seller ('the beneficiary') at the request of a buyer in India and had appointed the respondent ('MBB') to be the advising/negotiating bank in the LC transaction. PNB undertook to reimburse MBB for monies it had paid out to the beneficiary under the LC. At the buyer's request, it was a strict term of the LC that only an ocean bill of lading ('ocean BL') was acceptable and that a freight forwarder's bill of lading ('FBL') was not acceptable. Despite that condition, MBB had, on the strength of faxed copies of documents, including an FBL, paid out USD1,983,765.65 to the beneficiary. MBB sued PNB for reimbursement of that sum but PNB denied liability on the ground the LC had been fundamentally breached for failure to comply with the bill of lading ('BL') requirement. The High Court judge allowed MBB's claim holding, inter alia, that: (a) MBB was entitled to make payment in advance to the beneficiary in anticipation that the latter would submit the original documents pertaining to the LC; (b) PNB was obliged to honour its reimbursement undertaking to MBB even if the BL was non-compliant; and (c) PNB's claim that it had given MBB a valid notice of refusal to pay had not been proven. In the instant appeal against the decision, PNB rehashed the arguments it had made before the trial court, including the contention that the sum that MBB had paid to the beneficiary was in fact a loan.

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Held, unanimously allowing the appeal and setting aside the High Court's decision:

(1) The instant case concerned a fundamental breach of a term of the LC when MBB paid the beneficiary based on the FBL. It was a condition precedent in the LC that it had to be an ocean BL and that a FBL was not acceptable. Hence, this was not a case of a discrepant document but of non-production of an ocean BL as per the LC terms. Since it was a fundamental breach of the LC and not an issue of discrepancy; the giving of notice of discrepancy was a non-issue, but even if there was a notice requirement, a proper notice had been given on the special facts of the case. The trial judge had failed to consider the jurisprudence in detail. There was merit in the appellant's contention that since the LC requirement was not met, PNB was entitled to reject MBB's claim (see paras 4, 10(e) & (h)).

(2) MBB's submission that it had negotiated the documents based on fax copies and not the originals of documents was also a non-compliance with the terms of the LC. Professional banks should not act in such manner as it encouraged fraud and collusion and clearly was not within the mandate of the LC (see para 10(f)).

(3) It was not disputed that MBB had disbursed the funds before the maturity date of the LC. PNB alleged that the sum paid out by MBB to the beneficiary was a loan. On the facts of the case, MBB should have called the beneficiary as a witness at the trial. Its failure to do so added credibility to the appellant's case that the early payment out to the beneficiary had to do with a separate loan transaction. In the circumstances, there was no reason why adverse inference under s 114(g) of the Evidence Act 1950 should not be invoked (see para 10(j)).

(4) On the totality of the facts, the sum involved, the LC terms, UCP 600 requirements, the negotiating with fax copies of documents, the failure to call the beneficiary as a witness and the mode of proof of expert opinion, the respondent's conduct did not subscribe to the rule of law as well as case laws inclusive of the principles of accountability, transparency and good governance (see para 11).

[Bahasa Malaysia summary

Perayu ('PNB') telah mengeluarkan surat kredit ('SK') terhadap penjual Malaysia ('benefisiari') diatas permintaan pembeli di India dan telah melantik responden ('MBB') sebagai bank penasihat/perunding dalam transaksi SK. PNB berjanji untuk membayar balik MBB bagi wang yang telah dibayarkan kepada benefisiari di bawah SK. Atas permintaan pembeli, adalah syarat tegas SK bahawa hanya muatan kapal laut ('ocean BL') yang diterimapakai dan bahawa bil muatan pengangkut barang ('FBL') tidak diterima. Di sebalik syarat tersebut, MBB telah, berdasarkan salinan dokumen faks, termasuk FBL, telah membayar USD1,983,765,65 kepada benefisiari. MBB menyaman PNB untuk mengganti balik jumlah tersebut tetapi PNB menafikan liabiliti dengan

alasan SK secara asasnya telah dilanggar kerana tidak mematuhi syarat bil muatan ('BL'). Hakim Mahkamah Tinggi membenarkan tuntutan MBB dengan menyatakan, antara lain, bahawa: (a) MBB berhak membuat pembayaran terlebih dahulu kepada benefisiari dengan harapan bahawa mereka akan menyerahkan dokumen-dokumen asal yang berkaitan dengan SK; (b) PNB wajib mengikut akujanji pembayaran balik kepada MBB walaupun BL tidak dipatuhi; dan (c) tuntutan PNB bahawa pihaknya telah memberikan notis sah penolakan kepada MBB tidak dapat dibuktikan. Dalam rayuan segera terhadap keputusan tersebut, PNB mengulangi hujahan yang dibuatnya di hadapan mahkamah perbicaraan, termasuk hujahan bahawa jumlah yang telah dibayar oleh MBB kepada benefisiari sebenarnya adalah pinjaman.

Diputuskan, sebulat suara membenarkan rayuan dan mengetepikan keputusan Mahkamah Tinggi:

(1) Kes semasa adalah berkenaan dengan pelanggaran dasar SK ketika MBB membayar benefisiari berdasarkan FBL. Ini adalah syarat utama dalam SK bahawa ianya seharuslah ocean BL dan FBL tidak boleh diterima. Oleh itu, ianya bukanlah kes dokumen yang tidak sesuai tetapi ketidakpatuhan ocean BL mengikut syarat SK. Oleh kerana ianya adalah pelanggaran asas LC dan bukan isu ketidakpatuhan; pemberian notis ketidakpatuhan adalah bukan isu, tetapi walaupun terdapat keperluan notis pemberitahuan, notis telah dikeluarkan berdasarkan fakta istimewa kes ini. Hakim perbicaraan gagal mempertimbangkan perundangan secara terperinci. Terdapat merit dalam hujahan perayu bahawa memandangkan syarat SK tidak dipenuhi, PNB berhak menolak tuntutan MBB (lihat perenggan 4, 10(e) & (h)).

(2) Hujahan MBB bahawa pihaknya telah merundingkan dokumen berdasarkan salinan faks dan bukan dokumen asa; juga merupakan ketidakpatuhan terhadap syarat-syarat SK. Bank yang profesional tidak boleh bertindak sedemikian kerana mendorong penipuan dan pelanggaran dan jelas tidak berada dalam mandat SK (lihat perenggan 10(f)).

(3) Ianya tidak dipertikaikan bahawa MBB telah mengeluarkan dana sebelum tarikh matang SK. PNB mendakwa bahawa jumlah yang dibayar oleh MBB kepada benefisiari adalah pinjaman. Berdasarkan kepada fakta kes, MBB seharusnya memanggil benefisiari sebagai saksi dalam perbicaraan. Kegagalan untuk berbuat demikian menambahkan kredibiliti kepada perayu bahawa pembayaran awal kepada benefisiari berkaitan dengan transaksi pinjaman yang berlainan. Dalam keadaan tersebut, tidak ada sebab mengapa kesimpulan bermudarat di bawah s 114(g) Akta Keterangan 1950 tidak boleh digunapakai (lihat perenggan 10(j)).

(4) Mengenai keseluruhan fakta, jumlah yang terlibat, syarat SK, syarat UCP 600, perundingan dengan salinan faks dokumen, kegagalan memanggil benefisiari sebagai saksi dan cara keterangan saksi pakar, tingkah laku responden tidak mematuhi syarat undang-undang serta nas-nas kes yang merangkumi prinsip-prinsip tanggungjawab, ketelusan dan tadbir urus yang baik (lihat perenggan 11).]

Cases referred to

Banco Santander SA v Bayfern Ltd and others [1999] 2 All ER (Comm) 18, QBD (refd)

Equitable Trust Co of New York v Dawson Partners Ltd (1926) 27 Ll L Rep 49, HL (refd)

Gian Singh & Co Ltd v Banque de I'Indochine [1974] 2 All ER 754, PC (refd)

J H Rayner & Co Ltd and Oilseeds Trading Co Ltd v Hambros Bank Ltd [1943] KB 37, KBD (refd)

Jones v European and General Express Co [1920] 15 Asp MLC 138, KBD (refd)

Legislation referred to

Evidence Act 1950 ss 45, 114(g)

Appeal from: Suit No 22NCC-28–01 of 2014 (High Court, Kuala Lumpur)

T Gunaseelan (Keshvinjeet Singh with him) (Gunaseelan & Assoc) for the appellant.

Mong Chung Seng (Chia Oh Seng with him) (Lee Hishammuddin Allen & Gledhill) for the respondent.

Hamid Sultan JCA (delivering judgment of the court):

[1] The appellant/defendant's appeal is related to a letter of credit transaction often referred to as LC. The respondent/plaintiff's claim was related to reimbursement of USD1,983,765.65 paid to the beneficiary.

[2] In essence, the appellant's defence to the respondent's claim is that they are not liable as the bills of lading presented by the beneficiary to the respondent was non-compliant of the appellant's terms.

[3] The learned judge had allowed the respondent's claim and hence this appeal. This judgment must be read together with the judgment of the learned judge to appreciate the facts and law in the proper perspective. The appellant had set out a flow chart related to parties involved and we have inserted in brackets the facts which helps to understand the case and it is as follows:

LIST OF PARTIES

1. Punjab National Bank — issuing bank. (India)
2. SARA International Limited — the applicant of the Letters of Credit. (Buyer — India)
3. SIMS Cooper Sdn Bhd — Beneficiary. (Seller — Malaysia)
4. Royal Bank of Scotland — first advising bank under Letter of Credit.
5. Malayan Banking Berhad — second advising bank and negotiating bank. (Malaysia)
6. Wells Fargo Bank — appointed by Malayan Banking Berhad as agent to collect the sum payable. (Notice of non-compliance within 5 days given to Wells Fargo Bank as the respondent had earlier instructed to make payment to them.)

PRELIMINARY POINTS

[4] It is important to note that:

(a) it was a strict term of the LC that the freight forwarders bills was not acceptable;

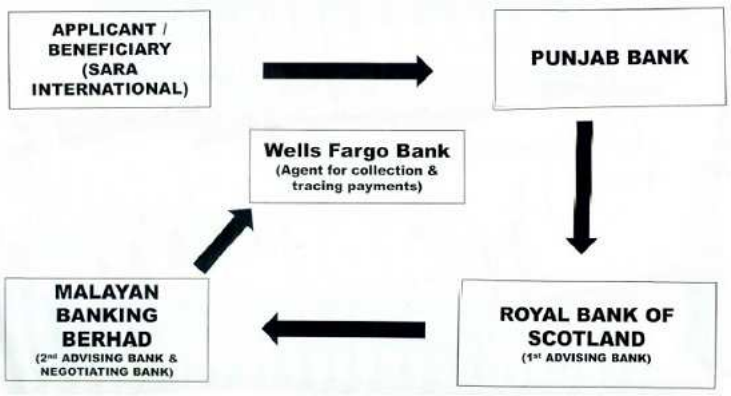
(b) the respondent without strict compliant of the terms of the LC had purportedly negotiated the documents on 25 November 2011 based on fax copies. There was, in essence some argument to say that the money advance is a loan with an intention to off set on the strength of the LC. Despite this evidence and the appellant alleging breach of the LC terms and the respondent asserting payment on the LC terms, jurisprudentially it was incumbent to call the beneficiary as a witness. The respondent did not call notwithstanding any reasonable tribunal appraised with the totality of the facts and the LC terms will come to a conclusion, it is indeed a colourable transaction (see *Banco Santander SA v Bayfern Ltd and others* [1999] 2 All ER (Comm) 18);

(c) the respondent also relied on opinion evidence on UCP terms without calling the maker and in breach of s 45 of the Evidence Act 1950 which was in breach of the rule of law;

(d) the respondent also relied on UCP terms in article 16 to argue that not presenting as stated in the LC is only a discrepancy. However, discrepancies from decided cases is related to contents in documents as opposed to document itself. The document in this case in issue is a freight forwarders bills and it was condition precedent of the LC that it must be an ocean bill and such condition precedent is accepted in article 1 of UCP itself and the learned judge had failed to consider the jurisprudence in detail. In essence, releasing on freight forwarders bills amount to a fundamental breach per se and the issue of discrepancies

does not arise at all in the first instance and that will also mean that the notice of discrepancy will be a non-issue if there is a fundamental breach of the terms of LC; and

(e) the notice of non-compliance on the facts of the case is also technical in nature as the negotiation took place on 25 November 2011 based on sterile fax documents in the light of the LC terms.


APPLICANT / BENEFICIARY (SARA INTERNATIONAL)
PUNJAB BANK
Wells Fargo Bank
(Agent for collection & tracing payments)
MALAYAN BANKING BERHAD
(2nd ADVISING BANK & NEGOTIATING BANK)
ROYAL BANK OF SCOTLAND
(1st ADVISING BANK)

BRIEF FACTS AND GROUNDS OF THE HIGH COURT

[5] The brief facts and grounds of the decision of the learned High Court judge has been placed before us in a rudimentary manner. To save courts time, we reproduce it verbatim and it reads as follows:

Brief facts:

1. This is an action commenced by the plaintiff against the defendant for recovery of the sum of USD1,983,765.65 which the defendant undertook to pay and reimburse the plaintiff under a letter of credit ('LC') issued by them.

2. At the request of the defendant, the plaintiff agreed to act in the LC transaction. The LC is a device used to finance international sale was issued by the defendant in favour of SIMS Copper Sdn Bhd ('beneficiary') at the request of Sara International Ltd ('applicant').

3. The LC was conveyed by the defendant through SWIFT message dated 18 November 20111 to the Royal Bank of Scotland ('RBS') which was forwarded by RBS to the plaintiff on 22 November 2011.

4. By SWIFT message dated 1 December 2011 to RBS, the defendant requested on behalf of the applicant for an additional documents to be presented under the LC (proposed amendment). The plaintiff notified the beneficiary of the proposed amendment but did not receive any response from them.

5. On 20 December 2011, the plaintiff received a SWIFT message from the defendant that they had acknowledged receipt of the original documents and bill of exchange but claimed that the documents contained two discrepancies ie (i) freight forwarder bills of lading presented contrary to the terms of LC, and (ii) certificate of analysis, weight and quality in triplicate issued by SGS not presented.

6. On 6 January 2012, the plaintiff received the original documents and bills of exchange returned by the defendant and paid the charges requested by them. Thereafter, the plaintiff continued to follow up on the status of the payment and reimbursement of the LC until the plaintiff commenced this action.

7. The plaintiff claimed: The plaintiff has proved their claim and thus entitled to be reimbursed by the defendant as they have negotiated the documents required under the LC and made payment of USD1,983,765.65 to the beneficiary. The defendant can only avoid liability to reimburse the plaintiff if the defendant can prove that the documents did not constitute a complying presentations and that a valid notice of refusal to the plaintiff pursuant to UCP-600 to reject the documents were given to the plaintiff. The defendant also failed to prove that they have issued a valid notice of refusal to avoid liability to reimburse the plaintiff. The defendant also is not entitled to raise other issues herein to avoid liability except for the issue of purported discrepancies.

8. The defendant contended: The defendant are not obliged to reimburse the plaintiff as the bills of lading presented by the beneficiary was non-compliant. The plaintiff had acted on their own risk by accepting faxed copies of the documents and making payment to the beneficiary on 25 November 2011 without examining the original documents. The sum of USD1,983,765.65 was paid by the plaintiff to the beneficiary was pursuant to a loan granted by the plaintiff. The notice to Wells Fargo is a valid notice of refusal and the plaintiff is estopped from challenging the validity of the notice to Wells Fargo.

9. High Court: The plaintiff's claim is allowed with costs.

Grounds of Decision of High Court.

1. It is the considered view that the bills of lading are in fact compliant with the requirements of article 14(1) and 20 UCP-600. There is no express provision in the LC excluding the operation of article 20 and in fact the LC did not specifically state what form of the bills of lading should take or its signing requirement.

2. The defendant objected the admissibility of P11 (ICC Opinion R734) on the basis that the document containing ICC Opinion R734 does not satisfy the requirement of s 45 of the Evidence Act 1950. The defendant argued that they are also deprived of the opportunity to cross-examine the person who provided the opinion and P11 is inadmissible under s 90A of the Evidence Act. However, the objection is overruled. PW1 gave evidence that he printed P11 from the digital library of ICC which was subscribed

by the plaintiff. PW1 also had tendered certificate in compliance of s 90A(2). Therefore, P11 is plainly admissible. There is nothing erroneous on the part of PW1 to treat the bills of lading as compliant based on the ICC Opinion R734 and the court finds no reasons not to accept the ICC Opinions R734 as they represent the views of considerable experts on the subject matter.

3. The plaintiff as the negotiating bank is perfectly entitled to make advanced payment to the beneficiary in anticipation of submission of the original documents by the beneficiary.

4. The defendant is obligated to honour the reimbursement undertaking they gave and such obligation is not absolved ipso facto even if the bills of lading are not compliant on the ground of discrepancies in the documents (which this court finds otherwise).

5. The court finds the defendant had failed to prove that they have given a valid notice of refusal to the plaintiff hence the defendant is liable to pay and reimburse the plaintiff.

6. In regards to the defendant's contention that the certificate formed part of the document under the LC by virtue of the proposed amendment which the plaintiff is said to have failed to forward them, this court finds that the certificate is not a document requirement under the LC.

7. Another defendant's contention regarding the notice of Wells Fargo issued by the defendant that pursuant to s 182 of the Contracts Act, the notice of refusal sent to Wells Fargo (the plaintiff's agent) on 8 December 2011 is valid as it has the same legal effect as it had been given to the plaintiff. On the other hand, the plaintiff argued that on settled principles, s 182 of the Contract Act only applies to impute knowledge acquired by an agent to his principal if the knowledge is obtained by the agent while acting within the scope of his agency. The court agrees with the plaintiff's submission. Since Wells Fargo was appointed by the plaintiff for the limited purpose of tracing and receipt of funds under the LC, the notice to Wells Fargo cannot in law be treated as notice to the plaintiff of the purported discrepancy in the documents and Well Fargo's knowledge of it cannot properly be imputed to the plaintiff.

8. Principle of estoppel does not apply against the plaintiff as there is no representation made by the plaintiff in the first place that they acknowledged the purported discrepancies and the validity of notice of refusal.

9. The court also satisfied with the PW1's evidence and it is shown that the plaintiff has paid the sum of USD1,983,765.65 to the beneficiary and the court finds that the plaintiff succeeds in proving their case against the defendants on the balance of probabilities.

PRELIMINARY JURISPRUDENCE RELATED TO LETTER OF CREDIT

[6] The LC is an important facility offered by banks to facilitate international trade. Strict compliance of the terms of the LC need to be complied with. This is a strict requirement. The UCP terms permit to condone discrepancies in contents but not documents which are fundamental in nature. The distinction is not one of an apple and orange but marble and pumpkin. Relying on cases where the factual matric are not the same is not acceptable as judicial precedent. Each case has to be decided on its own facts as well as conduct of the parties.

[7] It is well settled that the LC deals with documents and not goods. Thus, payment obligation is based on documents and not the goods. If there is non-compliance of documents, etc it would lead to chain reaction of disputes. Minor errors on the document may be condoned by the bank when releasing the money to the seller, ie the beneficiary. However, the buyer may not accept the condonation unless he has consented to it. For this reason, it is well accepted that the banks hold to the principles of strict compliance as it is a guarantor and had to be indemnified by the buyer or issuing bank as the case may be.

[8] The memorandum of appeal reads as follows:

1. Yang Arif Hakim Mahkamah Tinggi telah terkhilaf disisi undang-undang dan fakta apabila membenarkan tuntutan Responden terhadap Perayu.
2. Yang Arif Hakim Mahkamah Tinggi telah terkhilaf disisi undang-undang dan fakta apabila gagal memutuskan bahawa Responden telah mematuhi terma-terma surat kredit dan UCP 600 sebelum membuat bayaran kepada Benefisiari.
3. Yang Arif Hakim Mahkamah Tinggi telah terkhilaf disisi undang-undang dan fakta apabila gagal memutuskan bahawa Perayu telah memberi notis kepada Responden bahawa dokumen-dokumen yang dihantar oleh Responden kepada Perayu adalah tidak mematuhi ('non-compliant') dalam tempoh masa yang ditetapkan.
4. Yang Arif Hakim Mahkamah Tinggi telah terkhilaf disisi undang-undang dan fakta apabila gagal memutuskan bahawa notis tidak mematuhi notis ('notice of non compliant') yang diberikan oleh Perayu kepada agen Responden iaitu Well Fargo adalah memadai.
5. Yang Arif Hakim Mahkamah Tinggi telah terkhilaf disisi undang-undang dan fakta apabila gagal memutuskan bahawa penerimaan salinan faks, dokumen-dokumen oleh Responden daripada Benefisiari (SIMS Copper Sdn Bhd) sebelum membuat bayaran adalah tidak dibenarkan oleh terma-terma Surat Kredit dan/atau UCP 600.

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6. Yang Arif Hakim Mahkamah Tinggi telah terkhilaf disisi undang-undang dan fakta apabila gagal memutuskan jikapun salinan faks dibenarkan sebelum membuat bayaran, Responden gagal membuktikan bahawa Responden telah menerima semua dokumen melalui faks daripada Benefisiari.

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7. Yang Arif Hakim Mahkamah Tinggi telah terkhilaf disisi undang-undang apabila gagal membuat anggapan dibawah Seksyen 114(g) Akta Keterangan 1950 apabila Responden gagal memanggil saksi dari Wells Fargo untuk membuktikan bahawa Wells Fargo hanya mempunyai kuasa untuk menerima bayaran sahaja.

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8. Yang Arif Hakim. Mahkamah Tinggi telah terkhilaf disisi undang-undang dan fakta apabila gagal memutuskan bahawa Responden telah mengakui bahawa Responden telah membuat bayaran kepada Benefisiari berdasarkan kepada dokumen-dokumen yang tidak sah apabila Responden membuat bayaran kepada Perayu untuk kos Perayu menghantar balik dokumen-dokumen berkenaan.

D

9. Yang Arif Hakim Mahkamah Tinggi telah terkhilaf disisi undang-undang dan fakta apabila gagal memutuskan bahawa Responden telah mengakui dokumen-dokumen yang diberi oleh Benefisiari kepada Responden adalah tidak mematuhi terma-terma surat kredit dan/atau UCP 600 Responden telah meminta Perayu untuk mendapatkan kebenaran dari Pemohon surat kredit (SIMS Copper) mengenepikan keingkaran berkenaan.

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10. Yang Arif Hakim Mahkamah Tinggi telah terkhilaf disisi undang-undang apabila membenarkan permohonan Responden untuk meminda Penghakiman selepas Keputusan diberi pada 13.08.2018 supaya kadar pertukaran wang adalah berdasarkan kadar tarikh Penghakiman, yang jelas bertentangan dengan apa yang dipohon oleh Plaintif/Responden dalam Pemyataan Tuntutan.

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[9] It must be noted that one of the crucial issue here is related to freight forwarders bills of lading. Freight forwarders bills of lading may be a lesser form of security as it does not ensure goods has been loaded to the ship. A ocean bill of lading will ensure the goods has been loaded on the ship. In the instant case, it was the crucial contention of the appellant counsel that forwarders bills of lading is not acceptable to field 47B para G of the LC which states as follows:

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> G. SHORT FORM, BLANK BACK, STALE, FREIGHT FORWARDER, *HOUSE OF BILL OF LADING IS NOT ACCEPTABLE* CHARTER PARTY BILL OF LADING IS ACCEPTABLE

I

[10] We have read the appeal records and the able submissions of the learned counsel. After much consideration to the respondent's submission, we take the view that the appeal must be allowed. Our reasons, inter alia, are as follows:

(a) the respondent's submission is reflected in the judgment of the High Court. In our view, the learned judge did not consider article 1, in the proper perspective. Article 1 of UCP states as follows:

> Application of UCP
>
> The Uniform Customs and Practice for Documentary Credits, 2007 Revision, ICC Publication No 600 ('UCP') are rules that apply to any documentary credit ('credit') (including, to the extent to which they may be applicable, any standby letter of credit) when the text of the credit expressly indicates that it is subject to these rules. *They are binding on all parties thereto unless expressly modified or excluded by the credit*. (Emphasis added.)

(b) it is a condition precedent in the LC that the freight forwarders bills is not acceptable. One need to appreciate the reason why freight forwarders bills is a weak form of document in contrast to ocean bill of lading which relates to bill of lading issued by the owner of the ship or charterer of the ship which evidence that the goods have already been loaded on the ship. The bill of lading in such cases will give full detail of the carrier, etc; thereby triggering the international trade and the relevant laws and convention, inclusive of claiming damages against ship owners or where appropriate arrest of ship, etc. It will also have chain action related to insurance and stakeholder like banks, etc. However, a freight forwarders bills is more of a domestic bill and there is no assurance that the goods have been actually loaded on the ship and that the owner of the ship has actually endorsed that in essence the goods indeed has been loaded. Reliance of the freight forwarders bills may lead to many issues which may relate to fraud or loss of goods in the country of origin, etc (see Arun Kasi articles — (i) *Mewah-Oils Sdn Bhd v Lushing Traders Pte Ltd — Court of Appeal Decision: A Critical Analysis* [2020] 1 LNS(A) liv; (ii) *Excluding Liability for Misdelivery and Non-Delivery in Bills of Lading: Under Laws of Malaysia, Singapore and England & Wales* [2020] 1 LNS (A) lvi; and (iii) *Minmetals South-East Asia Corp Pte Ltd v Nakhoda Logistics Sdn Bhd — Court of Appeal Decision: A Critical Analysis* [2020] 1 LNS (A) xlix);

(c) there are a number of articles which we have gone through for and against the strength and acceptability of the freight forwarders bills but the discussion is not based on LC as well as a stipulation. In addition, the cases that the learned judge had relied on UCP 16 and 20, etc; which the respondent had submitted also does not deal with a condition precedent clause. Furthermore, the common law cases on bill of lading is related to ocean bill of lading as opposed to the freight forwarders bills of lading. The articles mentioned which we have gone through are as follows:

(i) *The Legal Status of the Freight Forwarders Bills of Lading* by Shane Nassal;

(ii) *Forwarder's Bill and Bill of Lading* by Dr John S MU;

(iii) *Banking On The House: Freight Forwarder Bills of Lading and the Co Case* by Dr David Goodwin; and

(iv) *Some aspect of Bills of Lading* by FR Malan and W Faul;

(d) a bill of lading at common law is reflective of the position of a legal document issued by a carrier to a shipper that details the type, quantity and destination of the goods. This characteristic may be absent in a freight forwarders bills. In *Jones v European and General Express Co* [1920] 15 Asp MLC 138, Rowlat J asserted that 'it must be clearly understood that a forwarding agent is not a carrier. He does not obtain possession of the goods and he does not undertake to deliver the goods ...';

(e) it is not a surprise because of the weak status of the freight forwarders bills that the appellant on the instruction of the buyer, had excluded it to be one of the accepted document as a strict requirement of the LC. In this respect, we find merit in the argument of the appellant that the LC requirement was not met with and the respondent's claim must be rejected. Support for the proposition is found in a number of cases and to name a few are as follows:

(i) *J H Rayner & Co Ltd and Oilseeds Trading Co Ltd v Hambros Bank Ltd* [1943] KB 37, McKinnon LJ observed:

> The legal result of a banker issuing a letter of credit has been considered in various cases to which I do not think it is necessary to refer, but two passages which have been mentioned by Goddard LJ, seem to me to sum up the position in general terms with the greatest accuracy. In *English, Scottish and Australian Bank, Ltd v Bank of South Arica (I)*, Bailhache J said: 'It is elementary to say 'that a person who ships in reliance on a letter of credit must 'do so in exact compliance with its terms'. It is also 'elementary to say that a bank is not bound or indeed entitled to honour drafts presented to it under a letter of credit' unless 'those drafts with the accompanying documents are in strict 'accord with the credit opened'.

(ii) in *Equitable Trust Co of New York v Dawson Partners Ltd* (1926) 27 Ll L Rep 49, the House of Lords observed:

> ... There is no room for documents which are almost the same, or which will do just as well. Business could not proceed securely on any other lines.

(iii) in *Gian Singh & Co Ltd v Banque de I'Indochine* [1974] 2 All ER 754, the Privy Council opined as follows:

> The issue of conformity

> The fact that a document presented by the beneficiary under the documentary credit, which otherwise conforms to the requirement of the credit, is in fact a forgery does not, of itself, prevent the issuing bank from recovering from its customer moneys paid under the credit. The duty of the issuing bank, which it may perform either by itself, or by its agent, the notifying bank, is to examine documents with reasonable care to ascertain that they appear on their face to be in accordance with the terms and conditions of credit. The express provision to this effect in Art 7 of the Uniform Customs and Practice for Documentary Credits does no more than restate the duty of the hank at common law. In business transactions financed by documentary credit banks must be able to act promptly on presentation of the documents. In the ordinary case visual inspection of the actual documents presented is all that is called for.

(f) the respondent's submission that it had negotiated the documents based on fax copies are also strictly in non-compliance with the LC and done on the frolic of their own. Professional banks should not act in such manner as it encourages fraud and collision and clearly is not within the mandate of the LC. Courts have shunned against such transactions (see *Banco Santander SA v Bayfern Ltd and others* [1999] 2 All ER (Comm) 18);

(g) article 1 of UCP in essence, supports the appellant's case even though UCP 600 has been agreed upon and it does not impinge on the fundamental terms of the LC itself inclusive of the express exclusionary clause related to freight forwarders bills;

(h) article 16 of UCP 600 relates to discrepant documents. In our view, this is not a case of discrepant document but non production of an ocean bill of lading as per LC terms. Thus, it is not an issue of discrepancy at all and the requirement of notice is not applicable, in view of the fundamental breach. Even if there is a notice requirement, we take the view that a proper notice has been given on the special facts of the case;

(i) in the instant case, we have looked at the freight forwarders bills and article 20. Article 20 in the instant case out to be read with article 1. Thus, the documents sent by fax as well as handed over, subsequently cannot be good for negotiation at all;

(j) in the instant case, it is not in dispute that money was disbursed before the maturity date of the LC and the sum paid out by the respondent was a loan sum, as alleged and was also an issue at trial. On the facts of the case, with many sham methodologies not consistent with the LC's strict terms, it would have been prudent for the respondent to have made available the beneficiary as a witness. Thus, it adds credibility to the appellant's case that the early payment out was to do with a separate loan transaction and there is no reason why s 114(g) of the Evidence Act

1950, ought not to be invoked; and

(k) the respondent attempting to give an opinion of UCP 600 without calling the maker as submitted by the appellant is not sustainable at all under the Evidence Act. The submission of the appellant on this point in our view has merit.

[11] Taking the totality of the facts, the sum involved, the LC terms, UCP 600 requirements and negotiating with fax copies as well as the failure to call the beneficiary and the mode of proof of expert opinion, it only reflects that the appellant's conduct is one of a sham, not subscribing to the rule of law as well as case laws, inclusive of the principles of accountability, transparency and good governance.

[12] For reasons stated above, we take the view that the appeal must be allowed and the order of the High Court must be set aside with costs for here and below. We will hear the parties' submission on costs as well as any other consequential orders, if relevant.

We hereby order so.

Appeal allowed unanimously; High Court's decision set aside.

Reported by Ashok Kumar